

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ALAN J. PERFECT

V.

C.A. NO. 05-1167

SUPERIOR TUBE COMPANY

MEMORANDUM OPINION AND ORDER

GOLDEN, J.

JANUARY 12, 2007

Plaintiff brought this action under the Age Discrimination and Employment Act ("ADEA"), 29 U.S.C. §§ 621 et seq. and the Pennsylvania Human Relations Act ("PHRA"), 43 Pa. Cons. Stat. Ann. §§ 955 et seq., claiming the Defendant discriminated against him on the basis of his age (67), retaliated against him and provided a hostile work environment based on age. By Order entered November 22, 2006, the Court denied the Defendant's motion for summary judgment in its entirety. In denying the motion, the Court, after reviewing the entire record, concluded that there were too many genuine issues of material fact to grant summary judgment in favor of the Defendant and against the Plaintiff. Defendant filed a timely motion for reconsideration, suggesting that certain of Plaintiff's claims fail as a matter of law and that summary judgment should be

granted at least as to those claims. After further review, we agree with Defendants that a small number of Plaintiff's claims can in fact be disposed of as a matter of law. Accordingly, we will grant summary judgment on only the following claims:

1. Plaintiff's Hostile Work Environment Claim

Defendant argues that it is entitled to summary judgment on this claim because Plaintiff did not include such a claim in either of the two Charges of Discrimination he filed with the Equal Opportunity Employment Commission ("EEOC") on January 16, 2003 and July 2, 2003. We agree.

Once Plaintiff filed a Charge of Discrimination with the EEOC, the scope of any resulting civil action must be defined by the scope of the EEOC investigation which can reasonably be expected to grow out of the charge of discrimination. Ostrowski v. Prudential Equity Group, LLC, 2006 WL 1330113 at *5 (M.D.Pa. 2006); Eaddy v. Pa Dept. Of Public Welfare, 2005 WL 1324881 at *2 (E.D.Pa. June 2, 2005). In the present case, there is absolutely no mention in either Charge of a hostile work environment based on age. Rather, the Charges only allege age discrimination and retaliation. As such, a hostile work environment claim could not be reasonably expected to grow out of Plaintiff's discrimination claims.

Plaintiff contends that the EEOC's Determination makes reference to a hostile work environment and that, therefore, the EEOC

must have considered such a claim. However, the Court's review of that document reveals no such reference by the EEOC to a hostile work environment based on age. Accordingly, judgment will be entered as a matter of law in favor of Defendant on Plaintiff's claim for hostile work environment based on age.

2. Plaintiff's claims under the ADEA and PHRA based on acts which occurred prior to March 22, 2002.

Under the ADEA, before a Plaintiff may bring suit in federal court, the Plaintiff must first file a Charge of Discrimination with the EEOC within 300 days after the alleged discriminatory act occurred. 29 U.S.C. § 626(d) (1991); Watson v. Eastman Kodak Company, 235 F.3d 851, 854 (3d Cir. 2000).

Plaintiff filed his first Charge of Discrimination with the EEOC on January 16, 2003. Therefore, any claim based on alleged incidents that occurred before March 22, 2002 (300 days prior to January 16, 2003), are time-barred and must be dismissed. Plaintiff alleges a number of incidents that allegedly occurred prior to March 22, 2002. These include: (1) not being invited to meetings related to the "stent" project in 1999; (2) being denied a promotion for the position of Tooling Engineer in January of 2000; (3) the visitor's chair from his work place being replaced with a chair of "lesser quality" on November 20, 2000 and (4) not being included in the Process Management training in 2000. Because these alleged acts all took

place prior to March 22, 2002, Plaintiff is time-barred from raising these claims in this suit under the ADEA.

Likewise, under the PHRA, the time for filing a claim with the PHRC is 180 days after the alleged discriminatory employment act occurred. 43 Pa. Cons. Stat. Ann. § 959(h). Since Plaintiff filed his first Charge of Discrimination on January 16, 2003, any acts occurring before July 20, 2002 (180 days prior to January 16, 2003) are beyond the 180-day filing period and are time-barred. Because the above-referenced incidents took place prior to July 20, 2002, Plaintiff is time-barred from raising them in this suit under the PHRA as well.

Plaintiff argues that these incidents are nevertheless not time-barred because they can be aggregated under a continuing violations theory. The Supreme Court of the United States recently limited the continuing violation theory to those acts which are not individually actionable as opposed to those acts which are discrete or individually actionable. AMTRAK v. Morgan, 536 U.S. 101, 113 (2002); See also O'Connor v. City of Newark, 440 F.3d 125, 127 (3d Cir. 2006). The Court explained that discrete discriminatory acts are not actionable if time-barred, even when they are related to acts alleged in timely filed charges. Each discrete discriminatory act starts a new clock for filing charges alleging that act and must be filed within either the 180-or 300-day time period after the act occurred. A

non-exhaustive list of discrete acts includes termination, failure to promote, denial of a transfer, refusal to hire, wrongful suspension, wrongful discipline, denial of training, and wrongful accusation.

Morgan, 536 U.S. at 114. Since each of the four incidents referenced above constitutes a discrete act under Morgan, each of those acts is independently subject to the statute of limitations. As noted above, each of those acts occurred outside the applicable limitation period for each Act.

3. Plaintiff's "Pattern or Practice" claim is barred.

Plaintiff makes references in his Amended Complaint to a pattern or practice of age discrimination by the Defendant. However, in order to establish a prima facie case of pattern or practice discrimination, a plaintiff must establish that the alleged discrimination was the employer's standard operating procedure . Cooper v. Federal Reserve Bank, 467 U.S. 867, 875-76 (1984).

Nowhere in Plaintiff's Amended Complaint does he allege that age discrimination was the defendant's standard operating procedure toward employees as a whole. Rather, Plaintiff simply alleges that the actions of the Defendant were part of a Defendant engaged in a "pattern and practice of illegal and unlawful discrimination, age harassment, age hostility and age retaliation committed by the employer against plaintiff." Amended Complaint at ¶ 40. Plaintiff must establish a pattern or practice of discrimination by the employer

against his employees as a whole, not a pattern or practice against only the plaintiff. Accordingly, judgment will be entered in favor of Defendant on Plaintiff's claim of pattern or practice discrimination.

Finally, Defendant correctly argues (and Plaintiff concedes) that Plaintiff's request for compensatory damages for pain and suffering and emotional distress must be stricken because such damages are not recoverable under the ADEA. Comm'r of Internal Revenue v. Schleier, 515 U.S. 323, 326 (1995); Rogers v. Exxon Research and Engineering, 550 F. 2d 834, (3d Cir. 1977).

An appropriate Order follows.

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ORDER

AND NOW, this 12th day of January, 2007, upon consideration of Defendant's Motion for Reconsideration and the Plaintiff's response thereto, it is hereby ORDERED that the motion [Doc. #34] is GRANTED. It is further ORDERED that the previous Order of the Court entered on November 22, 2006 is VACATED. It is further Ordered that the motion of the Defendant for summary judgment [#28] is GRANTED in part and DENIED in part.

Judgment is ENTERED in favor of the Defendant and against the Plaintiff on Plaintiff's claims for hostile work environment, pattern and practice of age-based discrimination, compensatory damages (pain and suffering, emotional distress) under the ADEA, and allegations related to any events that occurred prior to March 22, 2002.

The remainder of this case is referred to Magistrate Judge Arnold C. Rapoport for a settlement conference. Counsel are DIRECTED to contact the chambers of Magistrate Rapoport (610-776-0369) within 10 days of the date of this Order to arrange for said

settlement conference.

BY THE COURT:

THOMAS M. GOLDEN, J.